

IN THE MATTER OF the Ontario
Human Rights Code, R.S.O. 1980, c. 340, as amended;

AND IN THE MATTER OF a Complaint
dated March 24, 1982 by Ingram
Barnard against the Canadian Corps
of Commissionaires (Toronto & Region),
their Servants and Agents;

AND IN THE MATTER OF a
Board of Inquiry appointed to hear
and decide the Complaint.

BOARD OF INQUIRY: M.L. Friedland, Q.C.

APPEARANCES: Leslie M. McIntosh,
Counsel for the Human
Rights Commission

Brendan O'Brien, Q.C.
Counsel for the Canadian
Corps of Commissionaires
(Toronto & Region)

Hearings in the above matters were held in Toronto on
January 21, 22 and 23, 1985.

DECISION

Mr. Ingram Barnard is a permanent resident, but not yet a citizen, of Canada. In September, 1981, shortly after he arrived in Canada from India, he applied to the Canadian Corps of Commissionaires (Toronto & Region), hereafter referred to as the Corps, for work as a security guard. He had served with distinction in the Indian Army during the Second World War and then had worked in the Indian Civil Service. The Corps, which provides an extremely worthwhile service to society by providing employment for ex veterans, refused his application because he was not yet a Canadian citizen. He ceased to be a British subject when India gained her independence. The rules of the Corps state that, amongst other qualifications, "Commissionaires shall be such persons who are Canadian or British Subjects." The Commission and Mr. Barnard have brought a complaint under the Ontario Human Rights Code, 1980, alleging discrimination on the basis of "nationality". A new Human Rights Code, the Human Rights Code, 1981, came into operation in 1982. This complaint is under the old Code. I was appointed on January 4, 1985 to hear and decide the complaint. Hearings were held on January 21, 22 and 23, 1985.

Section 4(1)(b) of the 1980 Code provides that "No person shall ... refuse to employ ... any person ... because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin of such person." The Commission has restricted its case to discrimination on the basis of "nationality". Allegations of

discrimination on the basis of "ancestry" or "place of origin" which were contained in the original complaint were abandoned at the hearing. There was not the slightest indication in the evidence that the Corps discriminates on these grounds. The Corps contains members from many different backgrounds, but who are Canadian citizens or British subjects.

Counsel for the Corps argues that the relationship between a Commissionaire and the Corps is not one of employment but rather membership in a club and thus does not come within section 4 of the Act.

The Corps is a unique institution. It was founded in England in 1859 to assist retired soldiers and sailors to find useful work in the civilian world within the structure of a military-style organization. As the historical sketch in the Corps booklet containing its Rules and Regulations states (p. 12): "The Corps was originally designed for the professional sailor, soldier or airman after he is discharged to pension, to afford him an opportunity of augmenting his pension, retain in his life an atmosphere of comradeship and 'esprit de corps' and prevent him from going to seed by continuing in a life of service in keeping with the capabilities of his advancing years." This continues to a considerable extent to be true and there continues to be an important social aspect to the Corps. Commissionaires apply for membership in the Corps and not directly for employment. I have concluded, however, that the relationship between an applicant and the Corps is in essence one of employment and is therefore covered by section 4 of the Act.

A Commissionaire first joins the Corps and then is assigned to work by the Corps. Commissionaires are found as security personnel in many institutions, in courthouses, at airports, in government offices and in private businesses. Clients are obtained by the Corps and the Corps assigns Commissionaires to their tasks. The Corps considers Commissionaires as its own employees. The Corps rules state (p. 35): "A Commissionaire assigned to duty ... is an employee of the Corps and will be paid by the Corps." Although Commissionaires take part in several parades each year and there is also an annual dinner, there is very little else of a social nature for the approximately 700 active members of the Toronto & Region Corps. The Corps' mess was closed down several years ago. (There is, however, more of a club-like relationship for the 40 or so retired members of the Corps who meet once a month.) Basically then, the Corps finds employment for retired service personnel and pays them for their work. This was the objective of the founder in 1859. He was not establishing a social club. The Corps is therefore covered by section 4 of the Act.

Has there been discrimination because of nationality? The Corps requires that Commissionaires be Canadian citizens or British subjects. Is the concept of citizenship included in the word "nationality"? I agree with Professor Ratushny in his decision under the Human Rights Code that "nationality ... is broad enough to prohibit discrimination on the basis of citizenship" (Snyker v. Fort Frances-Rainy River Board of Education (1979) at p. 5; see also Rajput v. Watkins and Algoma University College (1976) (Tarnapolsky);

Tarnapolsky, Discrimination and the Law in Canada at pp. 167 et seq.; Keene, Human Rights in Ontario, at pp. 54-5). The 1981 Act now takes the issue out of the realm of interpretation by specifically referring to citizenship.

Counsel for the Corps argues that the Corps did not intend to discriminate on the basis of Mr. Barnard's Indian citizenship (the section says "because of ... nationality ... of such person"); rather, it is argued, the Corps requires Canadian citizenship and the discrimination was therefore indirect. Indirect discrimination, the Ontario Court of Appeal has said in the Simpsons-Sears case (Re Ontario Human Rights Commission and Simpsons-Sears Ltd. (1982), 138 D.L.R. (3d) 133) is not covered in the 1980 Code, although it is now specifically included by s. 10 of the 1981 Code. The argument cannot be accepted. To do so would mean that under the 1980 Act an employer could, for example, have restricted his hiring to white persons, thus only indirectly discriminating against blacks. The legislature certainly did not intend such a result; nor, I suggest, did the Court of Appeal in the Simpsons-Sears case. In Simpsons-Sears Mr. Justice Lacourcière stated (at p. 135) for the Court: "It is the opinion of this court that where an employment limitation does not fall squarely within one of the protected classifications of rights (race, age, creed), as in this case, there can be no offence unless the employer intended to discriminate on a prohibited ground." Surely the Court of Appeal would have concluded that the present case does "fall squarely within one of the protected classifications."



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An exception is provided by subsection 7 of section 4 which provides:

"(7) The provisions of this section relating to limitation or preference in employment because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin do not apply to an exclusively religious, philanthropic, educational, fraternal or social organization that is not operated for private profit, or to any organization that is operated primarily to foster the welfare of a religious or ethnic group and that is not operated for private profit where in any such case race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin is a bona fide occupational qualification and requirement."

Is the Corps excepted from the operation of section 4 because of this provision? The Corps is not "an exclusively ... fraternal or social organization." I have applied the word "exclusively" to "fraternal or social organization." Counsel for the Corps argues that "exclusively" can be interpreted to apply only to "religious" organizations. I do not accept this construction. "Exclusively" was surely meant to apply to all that follows, just as the word "primarily" in the second part of the subsection applies to both a "religious" and and "ethnic" group. In any event, assuming that the word "exclusively" does not apply, I would have difficulty in classifying the Corps as a "fraternal or social organization".

It is unnecessary, therefore, to decide whether the "bona fide occupational qualification and requirement" provision applies to both parts of the subsection, as Counsel for the Commission suggests,

or only to the latter part, as Counsel for the Corps suggests. If I had to decide that issue I would hold that the qualification applies to both parts of the subsection: non profit organizations covered by ss. 7 can only discriminate in limited circumstances; they are not given carte blanche to do whatever they want to do. Further, I would hold that in this case citizenship is not a bona fide occupational qualification or requirement. It should be noted that at least one other Corps in Canada, the Ottawa Corps, does not require Canadian citizenship. Citizenship does not assure the Corps that the applicant is knowledgeable about the institutions where will be working, or that he is honest or loyal or industrious or not a security risk. The Corps could try to ensure these attributes in other ways. Citizenship does mean, however, as Counsel for the Corps argues, that the applicant, if he became a citizen after being a landed immigrant, has sworn allegiance to the Crown. This is one of the stated "aims and objects" of the Corps (s. 3(a)): "To keep in perpetuity a whole-hearted allegiance to the Crown". But a non citizen can meet this requirement. Moreover, Canadian citizens by Birth would not have had to swear allegiance to the Crown. We should think very carefully before excluding a permanent resident from an equal opportunity to earn a livelihood.

Mr. Barnard was, therefore, improperly denied membership in and employment with the Corps. What relief should I grant? He continues to be interested in employment with the Corps and I order that the Corps consider as soon as reasonably possible any renewal of his application for membership.

It is difficult to determine with precision what he has lost by not being accepted as a member. The Corps pays its security guards somewhat more than Mr. Barnard was able to make working for a commercial security guard company. On the other hand, only about 75% of the Corps Commissionaires are working at any one time and Mr. Barnard may have worked fewer days than he was able to work for a commercial company. Moreover, Mr. Barnard had some medical problems over the last few years and may not have been able to work full-time. In the circumstances, and in the light of the uncertainties concerning the extent of his financial loss, I will award Mr. Barnard \$1,000 for lost wages. I will add another \$500 for the hurt feelings and wounded pride clearly felt by this former soldier who had fought for the Crown in the Second World War, was accepted as a permanent resident of Canada, but was rejected by the Corps.

There will therefore be an order that the Corps give Mr. Barnard the sum of \$1,500 and that the Corps consider as soon as reasonably possible any renewal of his application for membership in the Corps.

Dated at the City of Toronto in the County of York this 11th day of February, 1985.

A handwritten signature in cursive script, reading "M. L. Friedland".

Martin L. Friedland, Q.C.

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ORDER

This matter coming on for hearing on January 21, 22 and 23rd, 1985, before this Board of Inquiry, pursuant to my Appointment by the Honourable Russell H. Ramsay, Minister of Labour, dated January 4th, 1985, in the presence of Counsel for the Ontario Human Rights Commission and Counsel for the Canadian Corps of Commissionaires (Toronto & Region), the Respondent, upon hearing the evidence adduced by the parties and what was alleged by the parties and upon the finding of this Board, that the Respondent discriminated against the Complainant in refusing to employ him because of his nationality.

It is ordered that the Corps give Mr. Barnard the sum of \$1,500 and that the Corps consider as soon as reasonably possibly any renewal of his application for membership in the Corps.

Dated this 11th day of February, 1985.



M.L. Friedland, Q.C.
Chairman, Board of Inquiry

